IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

MACON COUNTY INVESTMENTS, INC.; REACH ONE, TEACH ONE OF AMERICA, INC.,

PLAINTIFFS,

v. **CIVIL ACTION NO.: 3:06-cv-224-WKW**

SHERIFF DAVID WARREN, in his official capacity as the SHERIFF OF MACON COUNTY, ALABAMA,

DEFENDANT.

SHERIFF DAVID WARREN'S RESPONSE TO PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

COMES NOW Defendant Sheriff David Warren ("Sheriff Warren"), who has been sued in his official capacity as Sheriff of Macon County, Alabama, and responds to Plaintiffs' Motion for Summary Judgment (Doc. 61) and Memorandum Brief in Support of Motion for Summary Judgment (Doc. 62) as follows:

I. PLAINTIFFS HAVE MISSTATED THE STANDARD OF REVIEW FOR SUMMARY JUDGMENT IN THEIR BRIEF TO THIS COURT.

As an initial matter, Plaintiffs misstate the standard for granting summary judgment. In their brief to this Court, Plaintiffs cite an Alabama state civil appeals case for the proposition that "[i]f there is no genuine issue of material (*sic*), then the moving party is entitled to a judgment as a matter of law." (Brief at pg. 8) Plaintiffs' reliance on this case is misplaced as the case does not stand for the proposition for which it was cited. Plaintiffs also overlook the fact that the standard for granting summary judgment consists of two prongs: (1) there can be no genuine issue of material fact **and** (2) the moving party must be entitled to judgment as a matter of law. Under Federal Rule of Civil Procedure 56(c), summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact **and that the moving party is entitled to judgment as a matter of law**." Fed. R. Civ. P. 56(c)(emphasis added). In the instant case, Plaintiffs rely upon unsupported allegations for their argument that no genuine issue of material fact exists. Moreover, Plaintiffs are not entitled to judgment as a matter of law because Plaintiffs have failed to exhaust administrative remedies and because they have failed to establish the elements of a viable Equal Protection Claim.

II. PLAINTIFFS HAVE MISSTATED FACTS PRESENTED TO THIS COURT IN THEIR BRIEF TO THIS COURT.

Plaintiffs have also misstated several "facts" upon which they rely in their brief. First, ten of Plaintiffs' twenty-seven paragraphs of "Material Undisputed Facts" are nothing more than vague, conclusory, and unsupported allegations. Second, Plaintiffs allege that one of the nonprofit organizations which holds a Class B Bingo License is "owned by the Sheriff's attorney's immediate family member." (Brief at pg. 6, ¶ 21 (Doc. 62.) This allegation is patently false and is not material to the single claim asserted by Plaintiffs in this action. Most importantly, Plaintiffs continue to attempt to perpetuate a misstatement to this Court.

In paragraph 27 of their "Undisputed Material Facts", Plaintiffs represent that "[b]ased upon those verbal assurances, the MCI has contracted to purchase land for the facility and to begin construction of the facility and has negotiated financing to purchase games for the operation of the facility." Plaintiff Macon County Investments, Inc.'s president and corporate representative admitted under oath in his deposition that no equipment had ever actually been purchased and that construction on the facility had not begun. (Deposition excerpts of Frank Thomas ("Thomas") 233:1-23, attached as Exhibit 1 to Sheriff Warren's Motion for Summary Judgment.) In fact, Plaintiffs later admitted in deposition that they had no assets or finances to construct the facility. (Thomas 229: 2-8).

III. THE SHERIFF HAS NOT "OVEREXTENDED HIS RULEMAKING AUTHORITY BY CREATING A MONOPOLY."

Next, Plaintiffs contend that the Sheriff has overextended the authority granted to him in Amendment No. 744. Plaintiffs acknowledge that Amendment No. 744 authorizes the Sheriff to promulgate rules and regulations for bingo games in Macon County. (Brief at pg. 9 (Doc. 62).) However, they claim that the Sheriff has exceeded that authority because:

> The Amendment places no limitations on the number of non-profit organizations which may be licensed in Macon County. The Amendment does not place a limitation on the number of facilities at which bingo gaming may be operated. . .the Amendment does not anticipate the promulgation of rules which would require a company to build a $15 million structure before it qualify (*sic*) as a location where bingo could be operated.

(Brief at pg. 10, Doc. 62.) Contrary to Plaintiffs' argument, Sheriff Warren did not "'regulate beyond the authority conferred by [his] enabling legislation'." (Brief at pg. 9, citing Seventh

Street, LLC. v. Baldwin County Planning and Zoning Comm'n, 172 Fed. Appx. 918, 2006 WL 531446 (11th Cir. March 6, 2006)[1].) The plain language of the Amendment specifically directs the Sheriff to promulgate rules and regulation for the licensing of bingo and places no restrictions on that authority: "The sheriff **shall** promulgate rules and regulations for the licensing and operation of bingo games within the county. The Sheriff shall insure compliance pursuant to any rule or regulation **and** the following requirements. . ." Amendment 744 (emphasis added). Thus, the Sheriff was given the unfettered authority to promulgate rules and regulations for the licensing and conduct of bingo. This includes the authority to require a minimum number of nonprofit organizations to contract with a third-party facility owner before the facility could be approved as a qualified location, and the authority to limit the number of bingo licenses that his office issued.

Plaintiffs contend that the mere fact that the rules have, in effect, created a monopoly is evidence that the Sheriff has overextended his rulemaking authority. However, this contention is due to be rejected because state regulation does not offend equal protection **even if** it results in a monopoly so long as the underlying regulation is rationally related to a legitimate governmental interest. See, e.g., City of New Orleans v. Dukes, 427 U.S. 297 (1976) (rejecting equal protection challenge of city ordinance limiting number of available permits, despite argument that scheme created monopoly for favored class, because ordinance was rationally related to government interest); Pacific States Box & Basket Co. v. White, 296 U.S. 176, 184 (holding that "the grant of a monopoly, if otherwise an appropriate exercise of the police power, is not void as denying the equal protection of the law"). See also Artichoke Joe's Cal. Grand Casino v. Norton, 353 F.3d 712 (9th Cir. 2003) (rejecting equal protection claim that casino gaming law gave Indian tribes monopoly on casino gambling because law was rationally related to state's interests in regulating gambling).

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[1] Interestingly, the Alabama Supreme Court found in Seventh Street, LLC. that the county did not exceed the authority conferred by its enabling legislation and the court affirmed the trial court's grant of summary judgment in the county's favor.

Sheriff Warren could rationally have believed, and specifically stated in his Commentary to the 2004 Rules, that the 15 license minimum could advance the goal of preventing abuse of charitable bingo by third-party facility owners and to spread the benefits among a representative group of nonprofit organizations. In addition, the Sheriff could have rationally believed, and specifically stated in his Commentary to the 2005 Rules, that capping the number of licenses could promote the regulation of gambling and prevent the harmful effects from wide-spread gambling operations. Therefore, the Plaintiffs cannot meet their burden of showing the absence of a rational basis for the 15 license minimum or the 60 license maximum. See Alamo Rent-a-Car, Inc. v. Sarasota Manatee Airport Auth., 825 F. 2d 367, 371-72 (11th Cir. 1987).

Finally, the rules and regulations promulgated by the Sheriff fall well within the Sheriff's police power. The regulation of gambling is a legitimate state interest under the police power. See Gulfstream Park Racing Ass'n, Inc. v. Tampa Bay Downs, Inc., 399 F. 3d 1276, 1278 (11th Cir. 2005). The Unites States Supreme Court has specifically upheld regulations designed to lessen demand for or access to otherwise legal gambling as a legitimate exercise of the government's police power to regulate potentially harmful activities for the protection of the public. See Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 345-47 (1986). "Gambling is traditionally suspect in our society, and investment in such an enterprise, when permitted at all, is plainly open to the strictest kind of scrutiny." Medina v. Rudman, 545 F.2d 244, 251 (1st Cir. 1976).

In Medina, a potential investor in a parimutuel greyhound racetrack filed suit against the racing commission alleging a violation of the 14th Amendment to the United States Constitution based upon the commission's refusal to allow the investor to participate in the ownership of the racetrack. Then-Attorney General of New Hampshire, David Souter, argued, and the court found, that racetrack ownership is not a fundamental right because it is not one of life's common occupations. Medina, 545 F.2d at 251. The court declined to apply a heightened level of scrutiny and declined to invalidate the state's racetrack licensing laws stating:

> We think the state, under its police powers, is entitled, if it elects, to issue racetrack licenses, and to regulate participation thereunder, on a discretionary basis as it has chosen to do here. Given the social evils associated with gambling and the state's revenue interests, the state's choice of means in the selection process is entitled to prevail over the private interests of potential investors. We do not decide if and to what extent a similar analysis would stand up if applied to another type of enterprise.

Id. at 251-252. The court also explained that "[w]hile vesting discretionary powers in a state commission may open the way to abuse, a state may reasonably believe that discretionary control makes it easier to see that licenses do not fall into the wrong hands and that only persons who will act affirmatively in the public interest obtain licenses." Id. This is the very ends that the 2004 and 2005 Rules sought to accomplish. The Sheriff did not want bingo licenses to fall into the wrong hands while at the same time protecting the county's revenue interests.

On the other hand, the Plaintiffs propose to do exactly what the regulations are designed to protect against: having one dubious charity act as a front for a gaming operation which has no facility, no assets, no bank account, no experience, and which was formed seven months **after** the 2005 Rules were promulgated. Therefore, the Sheriff acted well within both the authority delegated to him by the citizens of Macon County when they passed Amendment No. 744 and within the police powers. The Plaintiffs have failed to negate each and every possible basis for the rules and regulations. Accordingly, any argument by Plaintiffs that Sheriff Warren has overextended his rulemaking authority is due to be rejected by this Court and Plaintiffs' Motion for Summary Judgment is due to be denied.

IV. THE SHERIFF'S REASONS FOR THE REGULATIONS ARE REASONABLY RELATED TO A LEGITIMATE GOVERNMENT OBJECTIVE.

The Plaintiffs have also failed to produce any evidence that the three challenged bingo rules are not rationally related to a legitimate government objective. See Georgia Cemetery Ass'n, Inc. v. Cox, 353 F.3d 1319, 1321-22 (11th Cir. 2003) (affirming summary judgment in favor of defendant because rational basis existed for state law and regulations). Plaintiffs' claims do not involve any fundamental rights or suspect classes; but involve common social and economic regulation. Therefore, the rational basis test is the proper standard for review. See City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976). All that is required is to survive rational basis review is that some conceivable, rational basis could exist for the law or regulation. See Federal Communications Comm'n

v. Beach Communications, Inc., 508 U.S. 307, 313 (1993). Furthermore, the burden is on the plaintiff to negate every possible basis for the challenged provision. See Beach Communications, 508 U.S. 307, 314-15 (1993).

In promulgating the 2004 and 2004 amended bingo rules, Sheriff Warren issued commentaries explaining that the amendments were made to further the legitimate governmental objectives of regulating gambling, promoting economic development, and providing for the public welfare. Other rational bases, such as the suppression of fraud, protection of patrons and nonprofit organizations, and to discourage illegitimate or criminal elements could also be considered as grounds for the amended bingo rules. Consequently, the Plaintiffs have failed to show the absence of any conceivable legitimate basis for the amendments and cannot prevail on their equal protection claims as a matter of law. See Federal Communications Comm'n v. Beach Communications, Inc., 508 U.S. 307, 314-15 (1993); Panama City Med. Diagnostics Ltd. v. Williams, 13 F.3d 1541, 1545-46 (11th Cir. 1994). Therefore, Plaintiffs Motion for Summary Judgment is due to be denied.

V. Sheriff Warren Restates All Matters Set Forth in his Motion for Summary Judgment, Exhibits and Memorandum Brief in Support of his Motion for Summary Judgment as if Set Forth in Full Herein.

CONCLUSION

For the reasons set forth hereinabove, the Plaintiffs' Motion for Summary Judgment is due to be denied and Sheriff Warren is entitled to summary judgment as a matter of law as to all claims asserted against him in this action and said claims are due to be dismissed with prejudice.

Respectfully submitted,

s/Fred D. Gray, Jr.
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served upon the following by placing a copy of the same in the United States Mail, with proper postage prepaid, on this the 21st day of June 2007:

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